Ralf Michaels
Forthcoming in Elgar Encyclopedia of Private International Law

Joseph Story

Joseph Story (1779-1845) was one of the greatest and most influential American lawyers of all time. Both as a Supreme Court Justice and as a professor at Harvard Law School, his work and thought were, and still are, of great importance. Today's private international law would look different without him, both in the United States and in the rest of the world. At the same time, his approach to the field cannot be properly understood unless placed within his broader work on law, and the specific American background against which it was developed.

I. Life and work

1. Life, positions

Joseph Story was born in 1779, the same year as Carl Friedrich von Savigny (1779-1861) in Marblehead, Massachusetts, then with about 5,000 inhabitants the eighth biggest city in the young United States. Both the importance of commerce and the international connections of New England influenced him throughout his life. He went on to study at Harvard College, where he graduated second in his class. At the time, law was taught at almost no US universities, so he read law with a practicing attorney at Marblehead with great ambition, studying fourteen hours a day. In 1801 he was admitted to the Bar in Salem and practiced, successfully, as a lawyer in Essex County. As one of few Jeffersonian Republican lawyers in Massachusetts, he was an outsider, but his politics helped him gain the support of the influential *Crowninshield* family. Like many lawyers of his time he went into politics and was elected to the Massachusetts House of Representatives in 1805; in 1811 he became its speaker. His

greatest pride from this position was to have originated a law that doubled the salary of judges at the Supreme Judicial Court. From December 1808 to March 1809 he served, briefly, as a representative in the US Congress to replace *Jacob Crowninshield* (1770-1808); in this brief time he managed to win President *Thomas Jefferson's* (1743-1826) enmity over the President's repeal of an embargo against the British.

Despite *Jefferson's* reservations, President *James Madison* (1751-1836), in need of a Republican from Massachusetts, appointed *Story*, in November 1811, to the US Supreme Court – at age thirty-two the youngest US Supreme Court Justice ever. He remained on the court until his death in 1845. His first years on the Court were his happiest; he got along especially well with Chief Justice *John Marshall* (1755-1835). When *Marshall* died in 1832, President *Andrew Jackson* (1767-1845) chose *Roger Brooke Taney* (1777-1864) as Chief Justice over *Story*, whom he considered 'the most dangerous man in America', perhaps because of *Story's* demonstrated independence from partisanship. Though *Story* worked well with *Taney*, he became less happy with his other colleagues and with the increasingly political role of the Court, and considered retiring. Indeed, work as a Supreme Court Justice was strenuous. Washington DC, where the judges were active for six to twelve weeks each year without their families, was a most uninspiring place. In addition, Supreme Court Justices spent much time each year riding the circuits (for *Story* this meant Rhode Island, Massachusetts, Maine, and New Hampshire) and serving as federal appeals court judges. *Story* was proud of his work as a Circuit Justice and went on to publish his own opinions.

While remaining on the bench, *Story* took up, in 1829, a position as Dane professor at the Harvard Law School. The school, founded in 1817 (making it the oldest continuing university law school in the country), was fledgling; when *Story* joined in

1824, it had a mere 12 students. *Story*, in addition to his ongoing judicial work, turned out to be a prolific writer, a successful and enthusiastic teacher of law, and a harbinger of educational reform at Harvard. All of this paid out: during *Story's* time, the law school began to prosper; when he died, enrollment was up to 154 students. *Story's* aim, to turn Harvard into a national law school (and thereby enhance a national, as opposed to state-based, legal education) was a successful strategy, until our time.

The strains of this life took their toll on *Story*. In 1845, he announced his plans to retired, but died before he could put this plan into practice.

2. Contributions in general

Story's influence on American law is so great because he worked in two areas scholarship and judicial work, and scholarship and judicial work were mutually influential. On the one hand, *Story* wanted to establish American law as a science in which judges discovered principles through reason (insofar not unlike European jurists, though he criticized the Europeans' overly abstract and theoretical style). On the other hand, Story's scholarly work aimed at providing comprehensive treatment of individual legal areas on the basis of existing American case law.

a) Judicial opinions

As a Supreme Court Justice, *Story* wrote no less than 286 opinions, many of them influential (see H. Jefferson Powell, 'Joseph Story' in Melvin I Urofsky (ed), *The Supreme Court Justices: A Biographical Dictionary* (Routledge 2006)) 435). The decisions span a wide variety of fields, though a certain emphasis is on areas of commercial law, representing the expertise for which he had been appointed.

In general, *Story's* jurisprudence can be described by three elements. First, it was scholarly. *Story* took pride in working precisely and on the basis of existing case law, even where the outcome went against his own personal preferences or those of the politics of the moment; in this, he considered himself 'the last of the old race of judges.' At the same time, this meant that his opinions were usually meticulously researched. *Story's* erudition in the law provided him with a particularly scholarly approach to lawyering that contrasted with the sometimes more aphoristic style of his colleagues.

Second, *Story* was nationalist, meaning that as between the states and the federation he would often prioritize the latter. In one of the most influential decisions in this regard, *Martin v Hunter's Lessee* (1 Wheaton 304 (1816)), he emphasized that federal power came from the people and not from the states. As a consequence, the Supreme Court could review state court decisions concerning federal law. Elsewhere, he extended federal jurisdiction, for example in admiralty (*De Lovio v Boit*, 2 Gall. 398 (1815)).

Third, and relatedly, *Story* favoured the protection of private rights and the growth of private commerce unencumbered by politics. To this goal, he emphasized the constitutional protection of private corporations against interferences from the states (*Dartmouth College v Woodward*, 4 Wheaton 518 (1819)) and the protection of rights granted by the states against changing political preferences (*Charles River Bridge v Warren Bridge Co*, 11 Peters 420 (1837), J Story diss.). In his view, the states with their sometimes peculiar and parochial approaches to legal questions could stand in the way of both private rights and general freedom of commerce; national (or, where possible, even global) solutions were better equipped for the trans-border character of commerce.

b) Scholarship

Story's other great influence came as a scholar, especially while at Harvard. *Nathan Dane* (1752-1835), the founder of *Story's* chair, had stipulated that the donated money be used, in part, for the writing of comprehensive books on topics of American law. *Story* fulfilled this wish dutifully and with enthusiasm and wrote treatises in a wide variety of fields, all with several editions. These include treatises on bailments (Hilliard and Brown 1832; Little, Brown & Co 9th edn 1888), the US Constitution (3 vols, Hilliard, Gray & Co 1833; 5th edn, Little, Brown & Co 1905), conflict of laws (Hilliard, Gray & Co 1834; 8th edn, Little, Brown & Co 1883), equity jurisprudence (2 vols, Hilliard, Gray & Co 1836; 14th edn, Little, Brown & Co 1918), equity pleadings (Little, Brown & Co 1838; 10th edn, Little, Brown & Co 1892), agency (Little, Brown & Co 1839; 9th edn, Little, Brown & Co 1882), partnership (Little, Brown & Co 1841; 7th edn, Little, Brown & Co 1881), bills of exchange (Little, Brown & Co 1843; 4th edn, Little, Brown & Co 1860), and promissory notes (Little, Brown & Co 1845; Little, Brown & Co 7th edn 1878), He had planned additional books on shipping, insurance, equity practice, admiralty, and public international law, when he died in 1845. The treatise on the Constitution has remained a standard work; it is still cited frequently. Remarkably, all other treatises (with the exception of conflict of laws) concerned areas of federal common law (which had a much broader scope then than today) and thus had no need to deal with different state laws. In content they were often based on the law of the New England States, which was, however, stripped of its local character and thereby nationalized.

Story was not the sole originator of the treatise as a type of literature on US law. *James Kent* (1743-1847) (whom *Story* admired and to whom he dedicated his treatise on

the conflict of laws) had begun to write commentaries before. *Nathan Dane* himself had made the money that funded *Story's* chair at Harvard through the success of his 'General Abridgement and Digest of American law', much like *Charles Viner* (1678-1756) at Oxford had funded *Blackstone's* chair through money made from the publication of a similar work. *Story's* work, however, was more comprehensive than *Kent's* four volumes, and more systematic than *Dane's* Abridgement. Although *Story* frequently criticized civilian writers for their abstract reasoning (and himself indeed relied mostly on existing case law), he shared with the continental treatise literature the attention to system and the desire to demonstrate underlying principles. In this, *Story's* approach was more systematic than original: his treatises display knowledge and order more than new thoughts. At the same time, they served as something akin to civil codes, albeit (of course) non-legislative ones. Indeed, *Story* was an avid supporter of codification of the common law and presented, in 1837, a report on such a project for the governor of Massachusetts. The project did not come to fruition after he declared himself unable to serve as drafter. All in all, *Story's* treatises created a significant boost towards a more comprehensive understanding of US law and introduced what has later been called, in the United States, classical legal thought.

II. Contributions to private international law

Story made important contributions to many areas, but at least globally, his influence rests primarily on his treatise on the conflict of laws. As in other areas, *Story's* work in private international law consisted also on judicial opinions, and both jurisprudence and scholarship mutually influenced each other.

Ralf Michaels
Forthcoming in Elgar Encyclopedia of Private International Law

1. Story's commentaries on the conflict of laws

a) Precursors

In his inaugural lecture at Harvard, *Story* announced, that he planned a work on the conflict of laws in which he would 'venture far more than has been usual with publicists.' When he began work, he expected it to be his 'best Law work.' Indeed, at the time, the field as an intellectual discipline lay dormant, especially in the English language. As concerns England, this was understandable: although English courts had had to deal with issues of private international law repeatedly, the procedural nature of the common law at the time had prevented the development of a coherent doctrinal framework. In the United States, by contrast, relations between the states had led to a fast-growing case law that called for treatment. Nonetheless, *Story* could draw on very little scholarly material. *James Kent* had dealt with the conflict of laws in his commentaries. *Story* himself had written a brief treatment for a Digest of American law (Kurt Nadelmann (ed), 'Extract from Joseph Story's Manuscript "Digest of Law"' (1961) 5 Am. J. Legal Hist. 265-275); he had also treated the subject briefly in some of his other earlier treatises. Beyond this, the only relevant American treatment of the field was a treatise by *Samuel Livermore* (1732-1803), a Louisiana lawyer, written in response to a case in which *Livermore's* defense of the theory of statues, drawing extensively on civilian literature, had not prevailed (see Rodolfo de Nova, 'The First American Book on Conflict of Laws' (1964) 8 Am. J. Legal Hist. 136-156).

Livermore had donated his library to Harvard Law School and thereby provided Story with ample scholarly material for his treatise. *Story* made ample use of the material – he read Latin, French and Spanish though not German – and even introduced their most important works in the beginning of his treatise. But he found that the

civilian writings 'abound with theoretical distinctions, which serve little other purpose than to provoke idle discussions, and with metaphysical subtleties, which perplex, if they do not confound, the inquirer' (§ 11, p 10). Instead, he drew primarily, or at least in significant addition, on English and American case law, of which, at the time of his writing, there was a lot. (To some extent he also used judicial opinions from other jurisdictions.) The book was, therefore, very comparative in nature, but at the same time remained explicitly Anglo-American in its focus: *Story* aimed at demonstrating the approach of the United States to the conflict of laws, not a general theory or an assumed universal law of conflicts.

b) The role of comity

Despite *Story's* opposition to abstract theorizing, the treatise does contain a theoretical part in its chapter 2 ('general maxims'). Here, *Story* adopted three maxims that he borrowed from *Ulricus Huber* (1636-1694; Huber, Ulrik):

(i) every nation possesses an exclusive sovereignty and jurisdiction within its own territory (§ 18, p 19);

(ii) no state or nation can, by its laws, directly affect, or bind property out of its own territory, or persons not resident therein, whether they are natural born subjects or others (§ 20, p 21);

(iii) whatever force and obligations the laws of one country have in another depends solely upon the laws, and municipal regulations of the latter, that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent (§ 23, p 24).

This meant that questions of conflict of laws had to be resolved not by determining whether a statute was real or personal (as had been done under the theory of statutes), but instead, first and foremost, on the basis of a country's written or customary law . Only where these two are silent, the decision had to be made on the basis of general considerations of mutual interest and utility and a moral necessity to do justice (mainly by recognizing rights). (p 34).

States, thus had no duty to apply foreign law; they did so out of comity. This theoretical approach, though it is discussed frequently, was in reality neither new nor particularly relevant. It was not new because *Huber's* laying out of these principles had, as *Story* himself pointed out, been widely accepted in the United States; a reporter had even appended a translation of *Huber's* treatise to one of the US Supreme Court's early decisions. It has been suggested that *Story* misunderstood *Huber*, for whom comity was a binding obligation (Alan Watson, *Joseph Story and The Comity of Errors* (University of Georgia Press 1992)). Whether this was so matters little because an understanding of comity as nonbinding was widespread at *Story's* time. It was also in accordance with both the federalism of the United States and *Story's* interest, shared by others, in restraining the (extraterritorial) powers of the states (see G Blaine Baker, 'Interstate Choice of Law and Early American Constitutional Nationalism' (1993) 38 McGill L.J. 454).

The theoretical approach was not particularly relevant for three reasons. First, what *Story* had in mind was 'not the comity of courts, but the comity of the nation', meaning that judges had no discretion in determining whether or not to apply foreign law. The doctrine thus served as an explanation of what states do, but not as an empowerment for judges to rule as they pleased. Second, comity was very vague; *Story* pointed out that,

'from its generality, it leaves behind many grave questions as to its application'. The importance of the work lay not in this general basis but in the rules that Story developed. Third, comity functioned, in *Story's* treatise, less as a basis of developing doctrines and more as a check on general conflict-of-laws rules, akin to what would later become the public policy exception. Comity was the small public law element in a treatise otherwise dedicated to private law in its international and interstate dimension. It is rarely taken up in the later parts of the treatise.

One could think that *Story's* idea of comity, giving states freedom to refuse to apply foreign law, should stand in the way of his preference for national rules over state rules and for uniformity. That would be a misunderstanding. Comity was indeed a way to weaken the power of individual states, because it prevented states from imposing their laws on other states. And it did not stand in the way of uniformity, because it enhanced the legitimacy of application of foreign law: although conflicts rules were quasi-universal, their adoption rested on the decision of each state.

c) Content of the treatise

Story's general maxims play no great role for the rest of his treatise. What sets the treatise apart from earlier literature is not its theory but *Story's* comprehensive treatment of all areas of the law. Apart from the first two chapters, dealing with, respectively, introductory remarks and general maxims, *Story* groups the remaining 15 chapters into eight areas (§ 39, p. 39): persons, including marriage and divorce (chs 3-7), contracts generally (ch 8), personal and real property (chs 9-10), wills and succession (chs 11-12), persons acting for others ('*in autre droit*') (ch 13), remedies and judicial sentences (including jurisdiction and foreign judgments) (chs 14-15), penal laws and offences (ch

16), and evidence (ch 17). Structuring themes around areas of the law rather than types of statutes (real, personal, mixed), was a novelty. It was very much in accordance with viewing private international law as dealing not with conflicts between sovereigns nor with the characterization of statutes (real and personal) and more with the application of private laws across space – an approach later emulated by *Savigny*. At the same time, it reflected the general shift in common law doctrine away from individual causes of action and towards subject matter substantive doctrine.

All in all, *Story's* treatise displays a number of characteristics. First, *Story* conceived of conflicts of laws as more than just conflicts of statutes; by including conflicts between different local common laws he significantly enhanced the scope and importance of the field, especially for the common law. Second, he endorsed a strong territorialism over the (partial) personalism that had characterized the theory of statutes (Unilateralism). Connecting factors were almost always territorial – the place of the tort, the place of the contract, the place of the marriage, and so forth. Indeed, in his earlier digest and in his Harvard inaugural lecture, *Story* had described the scope of conflict of laws as the conflicts between *lex fori* and *lex loci*, not mentioning personal statutes at all. Third, he emphasized the importance of private rights (especially contract and property): those take up the largest part of the treatise, and he was the first to call the discipline 'private international law'. Both the application of foreign law and the enforcement of foreign judgments served, first and foremost, private interests and the protection of private rights – they were not, as they had been for earlier theorists, matters of respective recognition of sovereign acts. Fourth, despite his emphasis on comity and the discretion of states in applying foreign law, *Story* strove very much towards nationally uniform choice-of-law rules (as a second best to substantive law

unification). Fifth, *Story* did not distinguish between interstate and international conflicts, thus placing his approach to conflict of laws in a global framework, in accordance with the foreign literature which he cited.

2. Story's judicial decisions

Story's importance for the conflict of laws is not confined to his scholarship. As a circuit judge he rendered eleven decisions on interstate conflicts, showing his interest in the subject area in an almost treatise-like decision on the law applicable to contracts in 1820 (*Le Roy v Crowninshield*, 2 Mason 151). On the Supreme Court, the very first decision assigned to him concerned a conflict of laws (*U.S. v Crosby*, 11. U.S. (7 Cranch) 115 (1812)). He went on to author six more and participated in 23 more decisions. His two most important Supreme Court decisions for the discipline, both rendered in 1842, were not technically private international law decisions. Despite this, and although both were later overruled, they maintain crucial relevance for the field and are therefore here discussed individually.

a) Federal common law: *Swift v Tyson*

Story's most important decision, *Swift v Tyson* (41 U.S. 1 (1842)), claimed the existence of a general common law that trumped state common laws. At stake was a bill of exchange that was valid under accepted general principles of commercial law but invalid according to New York case law. Under the Judiciary Act, federal courts had to apply 'the laws of the several states' in common law cases. *Story* limited the term 'laws' to state statutes and rights and titles of a permanent locality, leaving out the common law, in particular contracts. In cases presenting common law questions, federal courts

therefore had to decide not on the basis of local case law but instead on the basis of general legal reasoning. The consequence would be a 'general commercial law' that would not be merely national but actually global, 'not the law of a single country only, but of the commercial world.' (*Swift v Tyson* (41 U.S. 1 (1842) at 19).

Swift v Tyson thus demonstrated both *Story's* nationalism (as opposed to the individual states) and his protection of commercial freedom from state interference, discussed above. The opinion could be viewed as expressing a preference of uniform law (like *lex mercatoria* or *ius gentium*) as an alternative to conflict of laws, but that would be an exaggeration. In reality, *Story* was very aware that different states had different common laws. The decision resolved, first and foremost, a conflict between parochial state laws on the one hand and trans-border commercial law, in favour of the latter, at least for federal courts. At the same time, however, it did posit the existence of some universal background law against which local laws are made, in this sense not unlike the European *ius commune*. Although later overruled (*Erie Railroad v Tompkins*, 304 U.S. 64 (1938)), the decision thus remains important.

b) Slavery: *Prigg v Pennsylvania*

Story's other important private international law decision concerned slavery, one of the most important conflict-of-laws issues in the *antebellum* Republic. Slaves who crossed the border from Southern states (where slavery was legal) to Northern States (where it had been abolished) created complex status questions – could they gain, and then keep, their freedom? Did they lose their status as property? The Constitution provided that slaves who escaped into another state were not thereby free from service but had to be returned (U.S. Const Art IV Sec 2 cl 3). The federal Fugitive Slave Act of 1793 (An Act

respecting fugitives from justice, and persons escaping from the service of their masters, Annals of Congress, 2nd Congress, 2nd Session (November 5, 1792 to March 2, 1793), Pages 1414-15, available at http://www.ushistory.org/presidentshouse/history/slaveact1793.htm) provided for enforceability of the clause.

In *Prigg v Pennsylvania* (41 U.S. 539 (1842)), a slave catcher had caught fugitive slaves in Pennsylvania (which had abolished slavery and even had a law declaring most slaves free once on Pennsylvania territory). *Story* held in his favour. Under his comity approach, *Story* could have declared Pennsylvania free to ignore, within its territory, the laws of slavery laws of other states: '[under] the general law of nations, no nation is bound to recognize the state of slavery,' so '[t]he state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws' (41 U.S. 611)). The fugitive slave clause in the Constitution, however, changed the matter for as positive law: 'the clause contains a positive and unqualified recognition of the right of the owner in the slave, unaffected by any state law or regulation whatsoever, because there is no qualification or restriction of it to be found therein … the owner must, therefore, have the right to seize and repossess the slave, which the local laws of his own state confer upon him as property.' (41 U.S. 612)). Because this was a consequence of federal law, it was up to the federal government to enforce rendition.

Story has been much criticized for his decision, both in his time and today. Abolitionists thought *Story*, who earlier had considered slavery 'repugnant to the general principles of justice and humanity' (*U.S. v La Jeune Eugenie*, 26 F.Cas. 832 (1822)) should have limited slavery. One explanation of the decision is that *Story's* nationalism and interest in maintaining the Union won over his opposition to slavery.

Another is that he hoped, by vesting enforcement of the fugitive slave clause in the federal government, he could effectively enable its limitation. Both, however, are political analyses of what was first and foremost the application of the law: *Story* read the fugitive slave clause as an implicit federal conflict-of-laws rule that he, as a judge, had to apply. Decisions over slavery were left to the process of amending the Constitution – which is what happened with the abolition of slavery after the Civil War.

III. Story's influence

1. At the time

The immediate influence of *Story's* treatise influence was tremendous. In the United States, it instantly became the standard reference for court and scholars dealing with private international law, and remained it for a long time. The Supreme Court (in a decision not authored by Story) explicitly adopted his comity-based approach (*Bank of Augusta v Earle*, 28 U.S. 519 (1839)). Not surprisingly, therefore, *Story* soon had occasion for a second edition (1841) that was not only enlarged (it almost doubled in size) but also contained a number of significant changes. It enabled *Story* to account not just for growing case law but also for the emerging new European scholarship (much of which inspired by his treatise) (Kurt Nadelmann, 'Bicentennial Observations on the Second Edition of Joseph Story's Commentaries on the Conflict of Laws' (1980) 28 Am.J.Comp.L. 67-77). In the foreword to the second edition, *Story* announced that he would not have much more to say on the topic; a third edition from 1846 was thus mostly a reprint of the second, containing *Story's* latest edits. Five more editions were published until the eighth edition in 1883. Indeed, the importance of the work can be viewed from the fact that no other similarly comprehensive treatise was published in the

United States for more than a hundred years, and when one finally was published – *Joseph H Beale's* (1861-1943) treatise – it was dedicated to *Story*, in memory of the centenary of *Story's* first edition. Around the same time, *Ernest G Lorenzen* (1876-1952) could demonstrate how many of the rules set up by *Story* had survived (Ernest Lorenzen, 'Story's Commentaries on the Conflict of Laws – One Hundred Years After' (1934) 48 Harvard Law Review 15, 20-26).

Story's influence was not confined to the United States. His treatise became the first American scholarly treatise to be cited by English courts, and it was indeed cited frequently. In England, unlike in the United States, it spurred a number of treatises on the subject, which however were not able to surpass it in importance for a long time. The Commentaries also wielded considerable influence on the law in Canada.

This influence in common law countries may seem less remarkably than the fact that *Story's* treatise was immediately influential in Europe. The German immigrant *Francis Lieber* (1800-1872) sent a copy of *Story's* Commentaries to *Carl Joseph Anton Mittermaier* (1787-1867) in Germany, who promptly reviewed the book extensively in his journal. *Mittermaier* announced to *Story* that a young lawyer from Heidelberg was preparing a translation into German. That translation, though announced by the publisher, never materialized, presumably due to the translator's death. *Story's* treatise spurred the first treatises in Germany: both *Wilhelm Schaeffner* (1815-1897) and *Savigny* admitted *Story's* great influence on their own treatises. (For *Wächter*, by contrast, with his own positivist and noncomparative approach, *Story's* work was not relevant.) *Savigny* himself provided, however, a different concept of comity from *Story's*, and indeed, the many treatises in the field that were published in 19th century Germany took, doctrinally, a different direction.

In France, *Jean-Jacques Gaspard Foelix* (1791–1853) demonstrated the great impression that *Story's* treatise had left on him not just in a letter to Story and a review of his work in his journal ([1834] 1 Revue étrangère 758; cf. 13 Am. Jurist & L. Mag. 237 (1835), but also in his own treatise (Jean-Jacques Gaspard Foelix, *Traité du droit international privé*, vol 1(Joubert 1843)). The influence shows already in the title, in the basis of private international in the idea of comity, and in several specific doctrines – even though *Foelix* remained in the structure of different kinds of statutes. Less influence seems to exist on Italy. A translation of the second edition of *Story's* treatise exists in manuscript but has never, it appears, been published (Kurt Nadelmann, 'Bicentennial Observations on the Second Edition of Joseph Story's Commentaries on the Conflict of Laws' (1980) 28 Am.J.Comp.L. 67, 74). *Pasquale Stanislao Mancini* (1817-1888), the foundational Italian scholar of private international law, was aware of *Story's* work but objected to his theory of comity.

Story's greatest influence outside the United States existed in Latin America, and it is only here that translations of his treatise were published (see Haroldo Valladão, 'The Influence of Joseph Story on Latin-American Rules of Conflict of Laws' (1954) 3 Am.J.Comp.L. 27). In 1880, *Hilario S Gabilondo* (ca 1849-1893) published a Spanish translation in Mexico (see Kurt Nadelmann, 'Una traducciòn Mexicana de los Comentarios sobre los Conflictos de Leyes de Joseph Story' (1983) 15 Jurídica – Anuario del Departamento de Derecho de la Universidad Iberoamericana 221 with republication of the translators' foreword and chapter 2 ibid at 221-232). A more important translation of the eighth edition was made in 1891 in Argentina by *Clodomiro Quiroga* (1838-1899). Even earlier, *Story's* treatise had left clear traces in the provisions on private international law of the Argentinian civil code of 1869 (see the

synopsis in Haroldo Valladão, 'The Influence of Joseph Story on Latin-American Rules of Conflict of Laws', (1954) 3 Am.J.Comp.L. 27, 34-38) and thereby, indirectly, on private international law in Paraguay, which adopted the code in 1889. Several private international law conventions also demonstrate such influence.

2. In the long run

In the long run, *Story's* influence is great though, in many ways, indirect. In the United States, the so-called American Conflict of Laws Revolution destroyed not just the formalism of the vested rights theory but also the classicism of *Joseph Story*. At the same time, contemporary conflict of laws in the United States still shows its roots in *Story's* theories, even though they have altered those considerably. Many specific doctrines in US law – at least outside of contract and tort law, the main *foci* of the American Conflict of Laws Revolution – remain, largely, unchanged. More importantly, perhaps, four of *Story's* foundations remain dominant in US conflicts thinking. Firstly, the idea that laws are, first and foremost, territorial, and that therefore the most important connecting factors must be territorial as well, is still stronger in the United States than in many other jurisdictions (Territoriality). Secondly, comity still plays a greater role in the United States than in other legal systems – a greater role in fact than it did for *Story*. Comity has emerged as a broad basis of conflicts decisions: that the application of foreign law is a matter not of obligation is a perspective that permeates US thinking in conflict of laws (Foreign law, application and ascertainment). Thirdly (and relatedly), modern interest and policy analysis adopts an idea that *Story* already emphasized at various places, namely that the conflict of laws is about policies and interests and that no nation is obliged to yield its own policies and interests to those of

other states. The difference is that *Story* aimed at limiting the reach of such policies, whereas modern choice of law enforces them. Fourthly, for contemporary conflict of laws in the United States, like for *Story*, interstate and international conflicts are treated similarly, and the model is the latter. All in all, despite all changes and evolutions and revolutions, there is still remarkable continuity between *Story* and modern conflict of laws.

This has been somewhat less so in the rest of the world, which is not surprising, given that Story wrote against the background of the US federal system. Although Story initiated the emergence of the field, the field moved on beyond him. Outside the United States, *Story's* most lasting contribution was, somewhat ironically, the name of the discipline – private international law. *Story* introduced the name almost in passing (§ 9, p. 9) whereupon it was adopted in Germany via *Schaeffner* and *Savigny* and in France via *Foelix,* while the common law stuck with the original name conflict of laws. Beyond the name, *Story* introduced the specifically private conception of private international law that has come to dominate the field outside of the United States. Methodologically, his decision to structure the field alongside areas of the law rather than types of statutes was an early precursor of the modern idea of specialized conflict of laws rules.

Ralf Michaels

Literature:

G Blaine Baker, 'Interstate Choice of Law and Early-American Constitutional Nationalism. An Essay On Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws' (1993) 38 McGill L.J. 454; Gerhard Kegel, 'Joseph Story' (1979) 43

RabelsZ 609; Gerhard Kegel, 'Wohnsitz und Belegenheit bei Story und Savigny' (1988) 52 RabelsZ 431; Gerhard Kegel, 'Story and Savigny' (1989) 37 Am.J.Comp.L. 39, translated as 'Story und Savigny' in *Festschrift der Rechtswissenschaftlichen Fakultät zur 600-Jahr-Feier der Universität zu Köln* (Heymanns 1988) 65; Édouard Lambert and JR Xirau, *L'ancêtre américain du droit comparé, la doctrine du juge Story* (Librairie du Recueil Sirey 1947); Ernest G Lorenzen, 'Story's Commentaries on the Conflict of Laws—One Hundred Years After' (1934) 48 Harvard Law Review 15 (French translation as 'A propos du centenaire des Commentaires de Story sur les conflits de lois' [1935] Rev.crit.DIP 295); Kurt Nadelmann (ed), 'Extract from Joseph Story's Manuscript 'Digest of Law'' (1961) 5 Am. J. Legal Hist. 265; Kurt H Nadelmann, 'Bicentennial Observations on the Second Edition of Joseph Story's Commentaries on the Conflict of Laws' (1980) 28 Am.J.Comp.L. 66 (French translation as 'Observations sur la seconde edition des *Commentaries on the Conflict of Laws* de Joseph Story à l'occasion de son bicentennaire' [1981] Rev.crit.DIP 1; Kurt H Nadelmann, 'Joseph Story's Contribution to American Conflicts Law: A Comment' (1961) 5 Am. J. Legal Hist. 230; R Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the New Republic* (The University of North Carolina Press 1986); Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, In Regard to Contracts, Rights and Remedies, and Especially in Regard to Marriages, Wills, Successions, and Judgments* (1st edn, 1834; 8th edn, Bigelow 1883); William W Story (ed), *Life and Letters of Joseph Story* (2 vols, John Chapman 1851); Haroldo Valladão, 'The Influence of Joseph Story on Latin-American Rules of Conflict of Laws' (1954) 3 Am.J.Comp.L. 27; Alan Watson, *Joseph Story and the Comity of Errors* (University of Georgia Press

1992); Konrad Zweigert, 'Die Gestalt Joseph Story's' (1949) 105 Zeitschrift für die gesamte Staatswissenschaft 590.

Entries for the Table of Contents

Classical Legal Thought
Codification
Comity
General common law
Huber
Interstate and International Conflicts
Lex mercatoria
Livermore
Nationalism
Private International Law, name
Slavery
Theory of Statutes
Treatise
United States

List of Abbreviations Used

Am. Jurist & L. Mag. American Jurist and Law Magazine
C.C. Circuit Court
D. District
F.Cas. Federal Cases
Gall. Gallison's Reports
Mason Mason's United States Circuit Court Reports
Mass. Massachusetts
Peters Peters' Supreme Court Reports
Wheaton Wheaton's Supreme Court Reports

List of Sources cited

United States:
Fugitive Slave Act of 1793 (An Act respecting fugitives from justice, and persons escaping from the service of their masters, Annals of Congress, 2nd Congress, 2nd Session (November 5, 1792 to March 2, 1793), Pages 1414-15, http://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=003/llac003.db&recNum=702

U.S. Constitution

Court Decisions
United States

Bank of Augusta v. Earle, 28 U.S. 519, 1839)
Charles River Bridge v. Warren Bridge Co., 11 Peters 420 (1837),
Dartmouth College v. Woodward, 4 Wheaton 518 (1819)
De Lovio v. Boit, 2 Gall. 398
Erie Railroad v. Tompkins, 304 U.S. 64 (1938))
Le Roy v Crowninshield, 2 Mason 151 (1820)
Martin v. Hunter's Lessee (1 Wheaton 304 (1816)),
Prigg v Pennsylvania (41 U.S. 539)
Swift v. Tyson (41 U.S. 1 (1842)
U.S. v. Crosby, 11. U.S. (7 Cranch) 115 (1812)
U.S. v. La Jeune Eugenie, 26 F. Cas. 832 (1822)